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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/909,667	07/20/2001	Stephen D. Kuslich	S85.2-9892	1524

490 7590 09/27/2002

VIDAS, ARRETT & STEINKRAUS, P.A.  
6109 BLUE CIRCLE DRIVE  
SUITE 2000  
MINNETONKA, MN 55343-9185

EXAMINER

PHILOGENE, PEDRO

ART UNIT PAPER NUMBER

3732

DATE MAILED: 09/27/2002

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Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/909,667

Applicant(s)

KUSLICH ET AL.

Examiner

Pedro Philogene

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 20 July 2001.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6, 7.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reiley et al. (6,248,110) in view of Kuslich (5,549,679).

With respect to claim 21, Reiley et al. disclose a device for compacting cancellous bone comprising an inner layer (266) and an outer layer (270,270a), the outer layer defining a flexible material which at least partially surrounds the inner layer, as best seen in FIG.29A, the inner layer defining an elastomeric body (56,266), the inner layer and the outer layer combination define an expandable body adapted to assume a collapsed geometry for deployment into bone and an expandable geometry for compacting cancellous bone (32,268) to form cavity (84), the inner layer defining a substantially hollow chamber (FIG.29A), the inner layer chamber and outer layer defining at least one opening (FIG.29A), the expandable body constructed and arranged to expand from the collapsed geometry to the expanded geometry when a predetermined amount of fill material is placed within the substantially hollow chamber through the at least one opening, the outer layer constructed and arranged to prevent penetration of the inner layer by the cancellous bone encountered during expansion of the expanded body; as best seen in the figures and as set forth in columns 11,12 lines 1-67.

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It is noted that Reiley et al. did not teach of an outer layer including a plurality of pores, which extend therethrough, as claimed by applicant. However, in a similar art Kuslich evidences the use of an expandable bag having an outer layer including a plurality of pores to allow tissue ingrowth while containing material packed into the bag.

Therefore, given the teaching of Kuslich, it would have been obvious to one having ordinary skill in the art at the time the invention was made to replace the fabric of Reiley et al with the fabric of Kulisch to provide an outer layer with a plurality of pores that allow tissue ingrowth while containing material packed into the bag.

With respect to claims 22-24, Reiley et al disclose all the limitations, as best seen in the Figures, and as set forth in column 17, lines 25-50, column 10, lines 47-67.

With respect to claims 1-20, the method steps, as set forth, would have been obviously carried out in the operation of the device, as set forth above.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

5,571,189	11-1996	Kuslich
6,235,043	5-2001	Reiley et al.
6,187,043	2-2001	Ledergerber
5,674,295	10-1997	Ray et al.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (703)


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308-2252. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin P Shaver can be reached on (703) 308-2582. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 305-3591 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0858.

Pedro Philogene  
September 23, 2002



**PEDRO PHILOGENE**  
**PRIMARY EXAMINER**